

**BEFORE THE SECRETARY OF STATE
STATE OF COLORADO**

CASE NO. OS 2007-0020

AGENCY DECISION

**IN THE MATTER OF THE COMPLAINT FILED BY COLORADO ETHICS WATCH
REGARDING ALLEGED CAMPAIGN FINANCE VIOLATIONS BY THE CITY OF
LAKEWOOD.**

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon the complaint of Colorado Ethics Watch (CEW) that the City of Lakewood violated § 1-45-117, C.R.S. of the Fair Campaign Practices Act (FCPA) by broadcasting comments of the Lakewood City Council President that were critical of one or more candidates for City Council and supportive of another candidate.

The Secretary of State received CEW's complaint October 30, 2007.¹ Pursuant to Colo. Const. art. XXVIII, § 9, the Secretary forwarded the complaint to the Office of Administrative Courts (OAC) for hearing. Hearing upon the complaint was held November 15, 2007. CEW was represented by its Director, Chantell Taylor, Esq. The City of Lakewood was represented by John W. Mill, Esq. of Sherman & Howard, LLC, and by City Attorney Tim Cox.

Issue

During the "public comment" period of the October 8, 2007 Lakewood City Council meeting, several members of the public spoke about their view of the Council's performance. A few of the speakers, including at least one candidate for City Council, were stridently critical of the Council's performance. Other speakers, including another candidate for City Council, Karen Kellen, spoke in support of the Council.

Immediately following the public comment period, the Mayor and two Council members responded to criticisms raised by the speakers. One of those members was Council President Cheryl Wise. Ms. Wise was critical of the negativism of the Council's detractors and urged voters to vote against City Council candidates who took negative positions. Though she did not explicitly name those candidates, it was clear from the context of her comments that one was a candidate for her seat on the Council, Charley Able. Ms. Wise also identified by name Mr. Able's opponent, Karen Kellen, and praised Ms. Kellen for her positive attitude about Lakewood. Ms. Wise urged voters to vote for

¹ CEW initially named Lakewood City Council President Cheryl Wise as the sole respondent, but amended its complaint November 5, 2007 to add the City of Lakewood as a respondent. By joint motion filed November 9, 2007, the parties stipulated to the dismissal of Ms. Wise. That motion was granted and the caption of the complaint was amended accordingly.

candidates with positive attitudes like Ms. Kellen's.

City Council meetings are public and are broadcast live on KLTv8, Lakewood's government access cable television channel. The meetings are also "streamed" live on Lakewood's website. The meetings are periodically re-broadcast on the TV channel and are maintained on Lakewood's website.

CEW alleges that by making comments critical of Mr. Able and favorable to Ms. Kellen, and by urging voters to cast their votes accordingly, Ms. Wise caused Lakewood to make a contribution in support of Ms. Kellen's election for public office in violation of § 1-45-117(1)(a)(I), C.R.S. of the FCPA. Among other things, § 1-45-117(1)(a)(I), bars state entities and political subdivisions from making contributions in campaigns involving the election of any person to public office.

Lakewood responds that it made no contribution because Ms. Wise's brief comments did not cause it to spend any money it would not otherwise have spent in conducting and broadcasting the meeting, and in any event the Council's purpose in broadcasting the meeting was not to influence elections. Lakewood further argues that Ms. Wise's comments are subject to a number of statutory exceptions. Because the ALJ concludes that Ms. Wise's comments were not a contribution to Ms. Kellen's campaign, the ALJ need not reach the issue of whether an exception applies.

Findings of Fact

1. Ms. Wise is President of the Lakewood City Council. Having held two terms as a City Council member, Ms. Wise is term limited.

2. The City of Lakewood is a political subdivision of the state of Colorado, and is therefore subject to the provisions of § 1-45-117, C.R.S. of the FCPA.

3. Two candidates ran for Ms. Wise's seat during the November 2007 election, Karen Kellen and Charley Able. Mr. Able was openly critical of several aspects of the Lakewood City government. Ms. Kellen, by contrast, was generally complimentary of the City government.

4. The City Council held a regularly scheduled meeting on October 8, 2007. The meeting was public, and was broadcast live on Lakewood's government access channel, KLTv8, as well as "streamed" live on Lakewood's website, www.Lakewood.org. The meeting was re-broadcast periodically on KLTv8 over the following two weeks, and is available for viewing indefinitely on Lakewood's website.

5. During the "public comment" period of the meeting, several members of the public spoke, including three candidates for City Council. A few of the speakers, including at least one of the candidates, were critical of the Council and the way Lakewood had managed current issues, including RTD lightrail access and a political contribution made by the Lakewood Housing Authority.² On the other hand, several speakers were quite complimentary of the City Council and the way the city was

² Mr. Able was not one of the speakers.

managed. One of those speakers was Ms. Kellen.

6. Although the time allotted for each speaker was limited to three minutes, the list of public speakers was not restricted and any member of the public, including the candidates for Council, could have spoken if they chose to do so.

7. Immediately following the public comment period, Mayor Burkholder, who chaired the meeting, responded generally to issues raised by the speakers and invited responses from the Council members. He prefaced his invitation with the remark that “we try to respond to questions of general interest.” Two Council members accepted the invitation, including Ms. Wise.

8. Ms. Wise began her comments by stating that she was term-limited and that “*there are two people who are running to fill my seat up here.*” Ms. Wise then directly addressed the voters in the upcoming election, and stated,

[V]oters, if you have a candidate who doesn’t understand that City Council doesn’t oversee the [City of Lakewood Housing Authority], I suggest that you don’t vote for them because if they don’t know what they’re in charge of, I wouldn’t put them in charge. I don’t know how much more blunt I can get about that.... It’s come to me that *one of the folks that’s running for my seat* is out there saying ... that boards and commissions are hand-picked ... but I’m telling you ... staff does not pick those appointments.

. . . .

If you have a candidate out there who is personally attacking any of our city staff, any of these city councilors, that’s the kind of representation you are going to get up here. And I don’t want somebody like that. If they are incapable of looking at the issue and can only talk about the personality behind it then they don’t deserve my vote....

9. Although Ms. Wise did not mention Mr. Able by name, the italicized language makes it clear that Ms. Wise’s comments were directed toward Mr. Able and in effect urged voters to vote against him because of his views critical of City government. Ms. Wise’s comments, however, were also directed toward other candidates who were critical of City government.

10. Ms. Wise commented favorably about Ms. Kellen:

I really like to approach in this city what’s right rather than what’s wrong.... And that’s exactly where I think the voters ought to vote.... You know, the list of what’s wrong is pretty short if you really think about it. Karen Kellen talked about that. I distinctly remember when I met her. She sat there for 10 minutes and told me every reason why she and her family chose to move to Lakewood and it was like we should have filmed her and put her on an advertisement for Lakewood....

11. During her comments, Ms. Wise remained seated at the Council dais and did not step down to the podium from which the members of the public spoke. A video caption identified her as Council President throughout her comments.

12. The total duration of the Council meeting was about 1 hour 45 minutes. Ms. Wise's comments lasted about six minutes.

13. KLTv8 is a government access cable television channel. It is funded by a 50 cent per subscriber fee assessed to the cable provider. The fees are paid by the provider to the City and placed by the City into an account dedicated to fund the TV station. KLTv8's operating expenses, including the salaries of the City employees who staff the TV station, are paid through that fund.³

14. The City's website is not a part of KLTv8, but is a separate function operated and funded by the City.

15. By speaking for six minutes during the Council meeting, Ms. Wise did not cause the expenditure of any public funds that would not otherwise have been spent had she not made her comments. This finding is based upon the following evidence:

a. No City employee was paid any more wages, benefits or other compensation as a result of the meeting lasting an extra six minutes.

b. The City did not incur extra expense for cable or internet service necessary to broadcast or re-broadcast the six minutes of Ms. Wise's remarks.

c. No evidence was presented that the City incurred any other expense to facilitate or broadcast Ms. Wise's comments.

d. The City's routine practice is to broadcast Council meetings "gavel-to-gavel." No special arrangements were made to include Ms. Wise's comments.

16. The City's sole purpose in broadcasting the City Council meetings by TV and internet is to provide the citizens of Lakewood with wide access to City Council meetings. Ms. Wise's comments were included in the broadcast because they were made during the course of the Council meeting. The City did not broadcast Ms. Wise's comments for the purpose of promoting Ms. Kellen or any other candidate's election.

17. The broadcast of City Council meetings is a routine function of City operations, and there is no evidence that Ms. Wise exercised any control over the details of the broadcast of the October 8th meeting. Furthermore, although the majority of the City Council may, or may not, have been in sympathy with Ms. Wise's comments, there is no evidence their personal views played any part in the decision to air Ms. Wise's comments as part of the routine broadcasting of the Council meeting.

Discussion and Conclusions of Law

Colorado's Campaign Finance Laws

The FCPA, §§ 1-45-101 to 118, C.R.S., was originally enacted in 1971, repealed

³ Though the fees collected from the cable provider are not tax revenues, they are nonetheless dedicated to a public function and therefore are "public moneys" within the meaning of § 1-45-117(1)(a) of the FCPA. *Cf. Denver Area Labor Federation v. Buckley*, 924 P.2d 524 (Colo. 1996) (because the Colorado Compensation Insurance Authority is a political subdivision of the state, the premiums it collects to fund workers' compensation insurance are public moneys).

and reenacted by initiative in 1996, substantially amended in 2000, and again revised by initiative in 2002 as the result of the adoption of Article XXVIII of the Colorado Constitution. The purpose of the FCPA is to avoid the potential for, and the appearance of, corruption in the political process. Section 1-45-102.

The section of the FCPA at issue is § 1-45-117(1)(a)(I). That section prevents government agencies and political subdivisions from, among other things, making “any contribution in campaigns involving the ... election of any person to any public office.” Its purpose is to promote confidence in government by prohibiting the use of money authorized for public purposes to advance the personal viewpoint of one group over another, *Denver Area Labor Federation v. Buckley*, 924 P.2d 524, 528 (Colo. 1996); and to prevent state agencies or political subdivisions from devoting public resources to persuade voters during an election. *Coffman v. Colorado Common Cause*, 102 P.3d 999, 1006 (Colo. 2004). Violations subject the agency or political subdivision to fines, injunctive relief, restraining orders and other “appropriate” relief. Section 1-45-117(4).

The Elements of an FCPA Violation

As applied to this case, the elements necessary to prove a violation of § 1-45-117(1)(a)(I) are:

- 1) That the City of Lakewood is a political subdivision of the state;
- 2) Which made “any contribution;”
- 3) In a campaign involving the election of Karen Kellen or any other person to public office.

There is no dispute that the City of Lakewood is a political subdivision of the state, nor any material dispute that Ms. Wise’s comments urged the defeat of Ms. Kellen’s opponent and supported Ms. Kellen’s election. The primary issue, therefore, is whether Ms. Wise’s comments amounted to a “contribution.” As the complainant, CEW bears the burden of proof. Section 24-4-105(7), C.R.S., as applied by Colo. Const. art. XXVIII, § 9(1)(f).

The City of Lakewood Made No Contribution

FCPA § 1-45-103(6)(a) adopts the definition of “contribution” found in Colo. Const. art. XXVIII, § 2(5). Section 2(5) reads, in pertinent part:

“Contribution” means ... (IV) *Anything of value* given, directly or indirectly, to a candidate *for the purpose of promoting* the candidate’s nomination, retention, recall, or election.

Italics added.

Section 1-45-103(6)(b) adds that a contribution includes the value of “goods, supplies [and] services” which exceeds the consideration or compensation received by the contributor of such goods, supplies and services. *See also Coffman, supra* at 1012 (“contribution” covers the contribution of personal services). Ms. Wise’s comments

opposing Mr. Able and favoring Ms. Kellen, however, were not a contribution by the City of Lakewood for at least two reasons.

First, the City broadcasts its City Council meetings for the sole purpose of widening public access to its meetings. Ms. Wise's comments were broadcast because they were part of the City Council's public meeting, and not for the purpose of promoting Ms. Kellen or any other candidate's election. Although the majority of the City Council may, or may not, have been in sympathy with her comments, there is no evidence that the City Council members, either singly or in combination, played any role in the decision to air her comments. Her comments were aired simply as part of the routine practice of broadcasting the entirety of the Council meeting. Therefore, regardless of Ms. Wise's personal motivation in making her comments, the City of Lakewood did not disseminate them "for the purpose of promoting" any candidate's election.

Second, the evidence is not sufficient to conclude that the City contributed "anything of value" to Ms. Kellen or any other candidate's campaign. Although services can form the substance of a contribution, there is no evidence here that Ms. Wise's comments caused the City to devote any employee time or other service to facilitate or broadcast her comments that would otherwise not have been devoted to broadcast the entirety of the City Council's meeting. In this regard, this case is similar to *Regents of Univ. of Colorado v. Meyer*, 899 P.2d 316 (Colo. App. 1995). In *Regents*, the University's president allegedly violated the FCPA by including a one-paragraph ballot issue discussion in a two-page school-funded newsletter to the University's 19,000 employees. The Court concluded that, among other reasons, there was no violation of the FCPA because "even if the challenged paragraph had been deleted, there would have been no difference in the cost, because a second side would still have been necessary to accommodate the remaining portions of the letter." *Id.* at 319. Following the rationale of *Regents*, there is no FCPA violation here because Ms. Wise's comments resulted in "no difference in the cost" to the City.

Although the general purpose of § 1-45-117(1) is to prevent the use of public money to advance the viewpoint of one group over another, *Buckley, supra*, the mere fact that Ms. Wise made her comments in her capacity as Council President and enjoyed the broadcast of her comments by TV and internet does not make her comments an illegal contribution. In *Colorado Taxpayers Union, Inc. v. Romer*, 750 F.Supp. 1041 (D. Colo. 1990), Judge Matsch rejected the plaintiff's argument that Governor Romer abused the power of his office by publicly opposing a state constitutional amendment during his official engagements. In Judge Matsch's opinion, elected officials are free to participate in the debate of public issues, and as long as the Governor's personal efforts were "not linked to the levers of the coercive authority of the government," there was no interference with the First Amendment rights of those opposing him. *Id.* at 1045.

Although *Romer* was not a case brought under the FCPA, the Supreme Court in *Coffman* nonetheless endorsed *Romer* for the proposition that as long as the official does not employ the "state machinery" to influence the election, there is no violation of the FCPA. *Coffman, supra* at 1010. In other words, a public official is free to express

his or her opinion in a public and even state-sponsored venue, provided the official does not invoke the government's coercive powers.

In this case, although Ms. Wise spoke in her official capacity and enjoyed the dissemination of her comments by TV and internet, she did not engage the "state machinery" to support one candidate over another. Rather, her relatively brief comments were made in the same venue as the public's comments to which she was responding, and involved no expenditure of public funds beyond what was already spent to air the entire Council meeting. She did not engage the "state machinery" any more than the other citizens who spoke during the Council meeting. In this regard, Ms. Wise's conduct is distinguishable from *Coffman*, where the Treasurer specifically engaged staff members to prepare press releases opposing a ballot issue and then incurred additional expenses to copy and fax those releases.⁴

Statutory Exceptions

Because Lakewood did not contribute anything of value for the purpose of supporting a candidate, and therefore did not violate § 1-45-117(1)(a) of the FCPA, the ALJ need not reach the exceptions urged by Lakewood.

Summary

Ms. Wise's six-minute statement during the Lakewood City Council meeting, during which she made comments supportive of one candidate and critical of others, did not amount to a contribution of anything of value by the City of Lakewood for the purpose of supporting any candidate's election, and therefore did not violate § 1-45-117(1)(a) of the FCPA.

Agency Decision

The City of Lakewood did not violate § 1-45-117 of the Fair Campaign Practices Act. This decision is subject to review by the Colorado Court of Appeals, pursuant to § 24-4-106(11), C.R.S. and Colo. Const. art. XXVIII, § 9(2)(a).

Done and Signed

November 21, 2007

ROBERT N. SPENCER
Administrative Law Judge

⁴ *Colorado Common Cause v. Coffman*, 85 P.3d 551, 555 (Colo. App. 2003), *aff'd* 102 P.3d 999 (Colo. 2004) ("The statute does not, however, authorize the expenditure of public funds for the expression of ... personal opinions.")

Digitally recorded in CR #2
Exhibits admitted:
Joint exhibit A

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the above **AGENCY DECISION** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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and

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on this ____ day of November 2007.

Court Clerk